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No. 92-1791

In The

Supreme Court of the United States

October Term, 1993

LLOYD EDWIN HUMPHREYS,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF PETITIONER

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STATEMENT

The "Brief for the United States in Opposition" demands reply because of significant errors represented in the facts of the case and the applicable law and new matters:

A. ADDITIONAL REASONS FOR GRANTING WRIT:

1. State courts are split on the issue of requiring a defendant to show actual bias or prejudice if a disqualified juror is deemed to be qualified by the trial court and seated by the court on the jury. See, *Tweedle vs. State,* 218 SW 2d 846 (Texas 1949) (No bias required – "A jury composed of twelve men one of whom falls within the disqualification . . . would not constitute a legal jury and their verdict would not be binding and be authorized to enter a conviction thereon on the defendant nor would the court); *C.F. Beasley vs. State,* 96 S 2d 693 (Ala 1957); *State vs. Benson,* 384 S 2d 208 (OR 1963); *State vs. Ortega,* 422 P 2d 353 (NM 1966); *Firestone vs. Freiling,* 188 NE 2d 91 (Ohio Ct. C.P. 1963); *Stagg vs. Stagg,* 32 P 2d 856 (Mont. 1934); *Ex Parte vs. Bronson,* 254 SW 2d 117 (TX 1953).

B. ERRORS IN FACT:

1. *Government Error:* Petitioner was *not* fined $10,007.80. The $10,007.80 was costs assessed including the purported salaries of government employees in preparation of demonstrative exhibits. The trial court held it

would *not* assess those costs against Petitioner but counsel did not timely object to such costs. (Error p.2 Government Brief, see appendix).

2. *Government Error:* There was, in fact, no "unreported escrow account", "through which unreported fees were processed" (Tr. 2 government brief). In fact, the account was in Petitioner's name, social security number and in the local community registered at his address. It was reported on tax returns. (See appendix).

3. *Government Error:* Petitioner did *not* stipulate "nearly $80,000 (tax) unreported legal fees for the years 83-85". (Government brief p.2). Fees not reported by CPA bookkeeper or claimed not fully reported barter income led to charges of $2,943 tax due in '83, $7,719 in '84, $4,011 in '85 (dismissed 1985). (Appendix). The Stipulation is that funds were received by the law firm, *not* the Defendant and that they were not "reported" directly to the accountant but recorded in records he would have to look at. Prosecution made several references to "write offs", "hidden account", or "unreported" in each and every case those have reference to the tax preparer, or internal records, *not* the Internal Revenue Service. The accused felt such references were misleading but that was their use. The "stipulation" drafted by the government shows money received by the law firm, not the accused, and refers to "unreported" to the C.P.A. not the Internal Revenue Service. This is in keeping with government references to "hidden account" or "write offs". All amounts were recorded in the accounting system but missed by the C.P.A.

4. *Government Error:* That although the CPA-book-keeper-tax preparer may have testified that he was unaware of receipt books and escrow account (Government Brief p.3), it was clearly established in the evidence that he worked with and reported the escrow account and that cash receipt books were kept stacked on the top of the bank deposit books. In order to pick up the bank deposit books, one would have to also pick up the cash receipt books that were stacked on each other. He was also aware fees were also reported on computer accounting and in fact had requested an extension to file based on that (Appendix). The investigating agent testified under oath "the internal records were surprisingly accurate".

5. *Government Error:* If IEM repaid loans, they were repaid with money which would have been distributed to Petitioner in Subchapter "S" Corporation, taxed like a partnership, in part from funds taxed to Petitioner. (See, Keech, TC Memo 1993-71; Kiplinger Tax Letter 3/26/93 p. 3 – Appendix)

6. *Government Error:* Government FN 1 is in error. That was a bald faced allegation which was *not* substantiated by the evidence. The charges were *not* amended and the alleged crimes are for $2,943 tax due in 1983, $7,719 tax due in 1984. The willful tax evasion crime of $4,011 for 1985 was dismissed when the evidence showed the IRS had moved 1985 income into 1984 in order to meet the Department of Justice Guidelines for the criminal prosecution of a minimum case of taxes owing over a 3 year period. *No taxes* were owed for 1985 (Appendix). Also see above government error No. 3. The funds were not received by the accused but by the law firm, and were

recorded in the recording system, but "unreported" to accountant who would have to look at receipts and records.

7. *Government Error:* It is error to state "Petitioner, however, never gave his accountant any information concerning his sale of the stock or his basis in the stock". The CPA-tax preparer had a full amortization schedule showing all money received and declining balance (Appendix). Accountant was fully informed of all payments.

8. *Government Error:* Government Brief repeatedly states "Affidavits" in referring to the basis for the wrongful issuance of the search warrant. There was only one (1) *sole* affidavit, that of the IRS special agent Donald Welter, with no first hand information nothing further.

9. *Government Error:* Government Brief page 5 states: "the court noted that the affidavits (sic) " . . . that this tax preparer relied solely upon the deposit records and that former employees were instructed . . . to give him all cash". There was only one (1) affidavit as noted above and it did *not* state any information on these matters. This is one factual error of the Court of Appeals.

10. *Government Error:* Government brief page 5 states: "Finally, the Court of Appeals found that 'nothing more than speculation and contradictory statements' had been offered to support Petitioner's claim that the government seized privileged attorney-client documents". There is no question that the file seized was identified as attorney-client privileged information and that the IRS seized it in their raid on the professional corporation, Humphreys & Associates Law Firm, P.C. and held it for 4-6 hours before returning it to Petitioner. The Court of

Appeals' comments go to the nature of the precise contents of the files. There is no question that the hard drive and files contained all documents prepared by the law firm for the client, and him to them. This computer was taken and searched for several days beyond the 10 day scope of the warrant and limitations of F.R.C.P.

11. *Government Error:* Government Brief page 9 " . . . that he instructed his tax preparer to base his tax returns exclusively upon the deposit records . . . " There is absolutely no such evidence. The former accountant had secretaries that received cash and checks and prepared monthly reports from which taxes were prepared. The secretaries prepared these from the cash receipt books and bank deposit books *they* made the entries in. The new accountant for the years in question prepared the monthly reports himself and although billing and being paid monthly for "cash receipt reconciliation" apparently omitted cash. (See Appendix).

12. *Government Error:* Government Brief page 12 "Because Petitioner did not move to transfer this action to the Northern District of Texas for 90 days after his arraignment (GCA Brief 30) the lower courts correctly found Petitioner's venue motion was untimely". In fact, Petitioner moved within twenty (20) days of his arraignment to transfer venue to Texas (See Appendix).

Questions presented in the Government's Brief only consist of a part of the questions actually presented. See Petition For Certiorari for complete list of questions presented which were not covered by Government Opposition.

ARGUMENT

1. The Government's Opposition does not deal with the following questions raised by Petitioner and establishes them as primary focal points for the court:

A. Faulty jury venire selection process allowing a per se statutorily unqualified juror on the venire?

B. Whether a verdict can be constitutionally "unanimous" if a juror is unqualified to deliberate and vote?

C. Is it error in a criminal case to shift the burden of proof from the government to the accused when the court has erred in deeming a juror qualified and seating him/her on the jury?

D. That modern technology must be considered in the scope of a search warrant and F.R.C.P. ten (ten) day search limitation as to the seizure and search beyond that scope of the memory of a computer with attorney-client privileged information?

E. Is probable cause for a search warrant being issued established when no crime or illegal conduct by the victim is alleged by the solitary affidavit of a government agent without first hand knowledge based not on personal knowledge?

F. Does the elements of fraud required by 26 USC 7202 remove it from being a lesser included offense of 26 USC 7101 which requires only "willfulness"?

G. Does adding a "lesser included offense" requiring an additional element of fraud after the evidence is closed create a constructive amendment not considered

by the grand jury under the 6th Amendment and for which accused had no opportunity to defend?

H. That the only actions by the accused which are the basis of prosecution were that signing and mailing of the tax returns in Texas. Any actions done in Iowa were those of the CPA-bookkeeper-tax preparer, not the accused?

I. That the accused-Humphreys being a Vietnam Veteran and former Judge Advocate captain in the U.S. Army suffered actual bias or prejudice from the felon juror who had been discharged from the military under other than honorable circumstances? (Note the offense of discharge was not the same as the juror's felony conviction).

2. The sole affidavit which was the basis of the issuance of the search warrant for the raid February, 1987, against the professional corporation, "Humphreys & Associates Law Firm, P.C." and the individual office of the accused within the firm, was not based on personal knowledge and did *not* allege any criminal conduct. It violated both 42 USC 2000 aa 11,12, and Department of Justice Directive 52 (1986) by not obtaining advance permission of the Assistant U.S. Attorney General. This must be considered in the "totality of the circumstances". It was Petitioner's belief that Directive 52 was issued pursuant to the authority of 42 USC 2000 aa 11,12. Government's position is that it was not. If so, of course, the restriction on such violation of required permission contained in the statute not being the basis to suppress would *not* apply; and the directive violation should have

tainted the warrant making it presumptively faulty, and the search and seizure of law office files illegal.

3. The ten (10) day limitation of the F.R.C.P. and the search warrant limit the time to search. Items of personal property containing potential information or evidence must be searched within that ten (10) day scope. The computer was seized and taken from the law firm. It was owned by the accused and leased to the law firm and was the sole word processor there. It was seized several days beyond the ten (10) day limitation.

4. The Government twists the facts giving rise to the venue objections in Iowa. The accused's only acts were the signing and mailing in Texas. He did absolutely nothing in Iowa. These criminal charges must be based on his actions; not those of an independent certified public accountant. The Government admits on page 12 of their brief that the returns were mailed in Texas but then claims 18 USC 3237b was not used in Iowa for venue. Exactly! It should have been in Texas. The '88 and '89 returns were held by the trial court not to be part of a common scheme or pattern by the accused (Judgment – page 6 par. 109-110). They could not have been used in evidence in the '83-'85 charges both due to chronology and court holding. It was prejudicial to include them in the same trial! (Appendix).[1]

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[1] It should also be noted that the Government is refusing to aggregate the sentences in this one judgment as required by 18 USC 3584(c) and is denying the accused parole because they claim they are separate and distinct matters. The Government is thus punishing accused more severely while taking an opposite position here. The end seems to justify their means.

5. The elements of §7201 and §7207 are different. §7207 requires fraud. §7201 does not. It cannot be a lesser included offense especially under these facts where there was no tax owed in the year of the 7207 conviction (1985) and no evidence of fraud. The *Schmuck* and *Sansone* holdings actually support Petitioner. In both holdings there was no lesser included offense. There was none here.

6. The instruction of the court is limited to the conduct of Petitioner. If his accountants, bookkeeper or staff were negligent, inadvertent or mistaken there is no crime. That defense was denied the accused.

Respectfully submitted,

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